IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:::

JUDGMENT

Doongarmal.
vs.
Bheemraj.

S.B.CIVIL SECOND APPEAL NO.140/2001 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 23.2.2001 PASSED BY SHRI B.D. SARASWAT, ADDITIONAL DISTRICT JUDGE, NAGAUR IN CIVIL APPEAL DECREE NO.42/1992.

DATE OF JUDGMENT ::: 26.4.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RR Nagori, for the appellant.
Mr. R Arora, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The substantial question of law which goes to the root of the matter is, “whether the first appellate court erred in law by not deciding the cross objection filed by the appellant ?”

The record of the first appellate court reveals that the appellant (respondent before the first appellate court) submitted cross objections under Order 41 Rule 22 CPC on 19.10.2002 and copy of the same was given to the counsel for the respondent (appellant before the first appellate court). By these cross objections, the appellant challenged the finding of the trial court recorded on issue no.1 wherein the trial court held that the wall in dispute is the joint wall of the plaintiff and defendant. The plaintiff's case was that the said wall belongs to the plaintiff alone and it falls within the pattasud land of the plaintiff. Since that was the core issue in the suit as well as the first appeal and any finding if recorded after considering the cross objections of the appellant, then that would have affected the judgment and decree of the first appellate Court. Since the cross objections have not been decided by the first appellate court which is the fact finding court and whose finding on issue of fact is binding upon this Court, therefore, this appeal deserves to be allowed only on this ground alone. The findings of the first appellate court on other issues are likely to be affected in case, the cross objections are allowed. Therefore, the findings on other issues recorded by the first appellate court in favour of the respondent cannot be sustained.

In view of the above, this appeal is allowed, the judgment and decree of the first appellate court dated 23.2.2001 is set aside and the matter is remanded to the

first appellate court to decide the appeal and the cross objections in accordance with law.

Both the parties are directed to appear before the first appellate court on 22.5.2006. The records of both the courts be sent to the first appellate court forthwith.

(PRAKASH TATIA), J.

S.Phophaliya